MARAPUTRA

v.

KUMAGAI GUMI

HIGH COURT MALAYA, IPOH
PS GILL J
[CIVIL SUIT NO: 22-12-90]
3 NOVEMBER 1999

CONTRACT: *Joint venture agreement - Breach - Common law damages - Whether joint venture agreement amounted in law to partnership - Breach of fiduciary duty - Damages and compensation in equity - Whether defendants owed fiduciary duty to plaintiffs - Reliefs available to plaintiffs - Whether equitable compensation in the form of damages available to plaintiffs - Whether joint venture agreement can be treated as a dormant relationship or joint venture simpliciter - Common intention of parties - Whether to make a profit*

CONTRACT: *Damages - Principles of - Laches - Acquiescence - Abandonment - Waiver*

The plaintiffs' claim against the defendants were as follows: (i) damages for breach of the principal agreement dated 13 September 1982 as varied by the supplementary agreement dated 23 December 1985; (ii) damages arising from the defendants' breach of fiduciary duty owed to the plaintiffs; (iii) an amount of the profits from the construction of highway projects subsequent to the contract works; (iv) an account to be taken on the basis of wilful default, to ascertain the profits which the joint venture would have made, but for the defendants' breaches of contract and fiduciary duty, payments by the defendants to the plaintiffs of the plaintiffs' share of such profits; and (v) all necessary inquiries.

The defendants by their statement of defence refuted the allegations in the plaintiffs' statement of claim and also relied on the defence of limitation, laches and acquiescence, and counter claimed for the sum of RM11,954,430 which was denied by the plaintiffs.

The plaintiffs had earlier entered into a joint venture agreement dated 13 September 1982 with the defendants as partners in regard to the construction of a certain portion of the Ipoh North and South Expressway Project.

Prior to the execution of the joint venture agreement, the defendants tendered for, and were awarded a contract by the Lembaga Lebuhraya Malaysia in regard to the construction of that portion of the Expressway. The contract was awarded to the defendants by letter dated 28 June 1982 for the sum of RM69 million with a condition precedent, that the defendants shall submit details of its joint venture agreement with a local contractor registered in Class A with the Ministry of Works and Public Utilities. Pursuant to this requirement, the defendants had written to the Ministry stating their intention to appoint the plaintiffs as their local partner, if their prequalification tender for the construction of the said road was accepted. The defendants having been prequalified for the project were invited to tender for the same on or about 16 September 1981. The invitation to tender contained a stipulation that the successful tenderers were required to form a joint venture with a Malaysian contractor who should hold a minimum of 30% participation, and must be registered as a PWD Class A contractor.

The proportion of shareholding in the joint venture was 70% for the defendants and 30% to the plaintiffs.

The plaintiffs alleged that the defendants had committed various breaches of the joint venture agreement. Hence, this suit by the plaintiffs against the defendants.

Held:

[1] The effect of the terms of the joint venture agreement was to create a partnership between the plaintiffs and the defendants. In the absence of any cogent and reasonable explanation, the court was entitled to conclude that the parties at the very least had entered into the joint venture agreement with a view to try and make a profit.

[2] Based on both the oral and documentary evidence, the court found that the defendants had failed categorically to inform the plaintiffs that the construction of a certain portion of the Ipoh North and South Expressway Project would not be profitable as no company would have willingly entered into a joint venture agreement knowing that there was no opportunity for making a profit.

[3] On the issue of limitation, the joint venture agreement was maintained throughout the course of the said project and no party had contracted out of it. The court found that there had been a series of breaches (and continuous) starting from 1982 till the proceedings were filed in court on 12 January 1990.

[4] The defence of limitation did not apply to the facts of this case and was not supported by tangible and credible evidence.

[5] In regard to the defence of laches, the plaintiffs had adduced evidence to explain the delay in issuing the writ of summons against the defendants. However, any prejudice suffered as a result of the delay was not caused by the action of the plaintiffs but that of the defendants.

[6] There was no basis for the defendants' contention that the plaintiffs were guilty by their conduct of acquiescence as the plaintiffs had all along protested both orally and in writing to the defendants as to the manner in which the defendants had considered themselves as partners in regard to the project.

[7] The plaintiffs were awarded damages in the sum of RM3,813,441 with interest being 30% share of their profits based on the profit of RM12,711,434.

[8] The counter claim by the defendants was devoid of any merits as by the supplementary agreement entered into between the parties, the defendants had agreed to indemnify the plaintiffs against all losses in the event of a loss.

[9] The plaintiffs were also awarded costs with certificate of two counsels.

[Plaintiffs' claim for damages allowed with interest and costs; defendants' counter-claim disallowed.]

Case(s) referred to:
Alfred Templation v. Low Yap Holdings [1989] 2 MLJ 202 ***(refd)***
Fraser Edmiston Pty Ltd v. AGT (QLD) Pty Ltd 2 Qd R ***(refd)***
Lindsay Petroleum v. Hund [1874] LR5 221 ***(refd)***
Matai Industries Ltd v. Jenson 1 New Zealand Law Report 525 ***(refd)***
Nocton v. Lord Ashburton [1914] AC 932 ***(refd)***
Sinnathamby Klondakoundan & Ors v. Brijkishore Shuparshad [1997] 4 CLJ 568 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 32
Partnership Act 1981, s. 3(1)

Other source(s) referred to:
Finn's Equity and Commercial Relations, Chapter 7
Halburys Laws of England, vol 16, 4th edn

For the plaintiff - WSW Davidson (Conrad Young, Zaheeda Ariff & Chew Gi Boo with him)
For the defendant - Lambert Rasa-Ratnam (Roz Mawar Rozain & William Khong with him)

Reported by VT Singam

JUDGMENT

PS Gill J:

The plaintiffs entered into a joint venture agreement (hereinafter referred to a JVA) with the defendants as partners in regard to the construction of a certain portion of the Ipoh North and South Expressway Project s. 1.3. This joint venture agreement was signed on 13 September 1982.

Prior to the execution of the JVA the defendants tendered for, and were awarded a contract by the Lembaga Lebuhraya Malaysia (hereinafter referred to as LLM) in regard to the construction of that portion of the Expressway referred to above. The said contract was awarded to the defendants by letter dated 28 June 1982 for a sum of RM69 million with a condition precedent, that the defendants shall be requested to submit details of a joint venture agreement, with a local contractor registered in Class A, with the Ministry of Works and Public Utilities. Pursuant to this requirement, the defendants had written to the Ministry of Works stating their intention to appoint the plaintiffs as their local partner, if their prequalification tender for the construction of the said road was accepted. The defendants having been prequalified for package 1.3. were invited to tender for that package on or about 16 September 1981. The invitation contained the stipulation that successful tenderers were required to form a joint venture with a malaysian contractor who should hold a minimum of 30% participation, and must be registered as PWD Class A contractors. The successful tenderer should be required to furnish proof of the joint venture, before the letter of acceptance of tender could be issued by the LLM. This requirement was in line with the policy of the Government of Malaysia, and required active participation by a local contractor in the performance of the contract, and was in line with the New Economic Policy of the government which required genuine equity participation, and transfer of technology.

The plaintiffs alleged that they signed the JVA in the belief that this agreement constituted the real and only relationship between them and the defendants, thereby making them a genuine partner.

The joint venture agreement between the plaintiffs and defendants dated 13 September 1982 states the proportion of shareholdings in the joint venture namely 70% Kumagai (defendants) and 30% Maraputra (plaintiffs).

Clause 3 of the JVA stated that the joint venture shall be held responsible for the execution, completion and maintenance of the contract works under the principal contract. A joint venture management committee was to be set up from representatives of both plaintiffs' and defendants' company. This committee was to deal with all matters relating to the management and conduct of the affairs of the joint venture except, matters relating to accounts, and the appointment of a project manager. A joint venture account was to be opened with Hongkong Shanghai Banking Corp. into which all receipts in connection with the contract works were to be deposited. At the end of September of each year, the joint venture account should be audited by auditors, who were to be appointed upon agreement by the parties. Upon completion of the contract works, the final balance sheet and profit and loss account (hereinafter referred to as the "Final Account") should be prepared and audited.

Neither parties to the joint venture could withdraw from the joint venture without the approval from the Lembaga Lebuhraya Malaysia and/or the other party.

It was also a term of the joint venture, that the parties shall use their best endeavour to ensure that the joint venture shall work successfully and profitably, and the parties shall keep each other promptly informed in respect of all matters relating to, and affecting the joint venture. It was alleged by plaintiffs that defendants committed various breaches of the joint venture agreement.

The plaintiffs' claim is for:

1) damages for breach of the principal agreement as varied by the supplementary agreement,

2) damages arising from defendants' breaches of fiduciary duty owed to the plaintiffs,

3) an amount of profit from the construction of highway projects subsequent to the contract works,

4) an account to be taken on the basis of wilful default, to ascertain the profit which joint venture would have made, but for the defendants' breaches of the contract and fiduciary duty, payments by the defendants to the plaintiffs of the plaintiffs share of such profit,

5) all necessary inquiries.

The defendants in their defence refuted the allegations in the plaintiffs's statement of claim and also relied on the defence of limitation, laches and acquiescence, and filed a counterclaim for RM11,954,430 which was denied by the plaintiffs.

On 23 December 1985 the plaintiffs and defendants entered into a supplementary agreement, whereby the defendants agreed to indemnify the plaintiffs against all liabilities. On 24 December 1985 *vide* a side letter dated the same day, the defendants agreed that in the event, a profit was made in regard to the joint venture agreement, the plaintiffs would be entitled for a share of the profits in accordance with the principal agreement, without any regard to the provisions of the supplementary agreement.

The plaintiffs and defendants called a number of witnesses. The first witness for the plaintiffs was PW1 – Mr. L.T. Wong who holds a diploma in Civil Engineering from Technical College, Kuala Lumpur and joined the plaintiffs' company as business manager in 1980. PW1 gave a short resume of the plaintiffs' company and stated the circumstances under which the joint venture agreement came about. He emphasised in his evidence that the plaintiffs wanted an active partnership in the joint venture with the defendants, and were prepared to make a cash contribution in accordance to their share in the joint venture, subject to the defendants showing their cash flow to the plaintiffs.

PW1 stated that on 3 September 1982, defendants gave the plaintiffs a copy of the tender prices and after having examined them, PW1 was of the view that the contract should be profitable. He stated categorically that at no time was he, or any other person in the plaintiffs' company, informed by the defendants, that they were prepared to suffer a loss in order to get a foothold in the highway construction industry in Malaysia. PW1 went on to state that if this fact had been communicated to the plaintiffs by defendants, the plaintiffs would not have entered into the joint venture agreement. PW1 also stated that no joint venture account was kept in regard to the profit. The plaintiffs' estimated the cost of the project, initially to be about RM63 million *vis-a-vis* the defendants' first budget of 74 million. According to PW1, Mr. Koda – (DW1) did not give him a satisfactory explanation as to how the figure of RM74 million was arrived at, and he also added that the plaintiff were not informed about the intention of the defendants to give sub-contracts to certain Japanese companies, one of which was a subsidiary of the defendants. PW1 was of the view that local contractors could have done the same job as foreign sub-contractors, and at a cheaper rate, especially in the area of earthworks.

The witness also alleged that the cost of the machinery used in the project was far in excess than normal, and finally the accounts in regard to the joint venture had never been verified and audited, and were not tendered.

Under cross examination, PW1 stated that plaintiffs have had experience in constructing various type of road works when the plaintiffs were awarded such contracts by government agencies. He also produced a document 1D3 as the Track Record of the plaintiffs. This was to show that even prior to the 1.3 project, plaintiffs were a successful company. PW1 also stated that the plaintiffs came to the conclusion that the project was profitable by working on the bill of quantities of the tender price, in particular the bill of quantities for earthworks. The plaintiffs' estimated the profit for the project to be about six to seven million dollars. PW1 gave five reasons in his cross examination as to why the plaintiffs entered into the joint venture. Firstly, one Mr. Furato told the plaintiffs that the highway project would be profitable. Secondly, the person who had introduced Mr. Watanabe (representative of defendants' company) had in the past introduced good Japanese companies to plaintiffs like Daihatsu. Thirdly, looking at the rates in the bill of quantities regarding earthworks, plaintiffs came to the conclusion that this would be a profitable venture. Fourthly, the internal budget of the defendants showed a profit of one million. Finally, the plant depreciation and cost of repairs was inclusive in the rates submitted by the defendants.

PW1 reiterated under cross examination that plaintiffs were not told by defendants prior to the signing of the joint venture that the project 1.3 was unlikely to make a profit. He also denied under oath that defendants told plaintiffs that if there was a loss the defendants would underwrite the loss. The plaintiffs stated that their sole motive in going into the joint venture was to make a profit and that the plaintiffs were "short changed". Plaintiffs did not get any goodwill, direct, or indirect, and also no benefit from the joint venture.

PW1 stated in re-examination that the plaintiffs did not pull out of the joint venture because, firstly, they were indemnified against losses, and secondly, they were assured at all times by defendants through an employee Mr. Warashino, that if the contract is completed on time, there would be a profit.

The plaintiffs' second witness PW2 – Mr Low Nga holds a diploma in Civil Engineering and worked for the J.K.R Department in Perak for about 28 1/2 years. In the course of his work, he was involved in surveying, design, and construction of roads, bridges, culverts, and maintainance of roads. PW2 joined the plaintiffs' company in 1980 and in such capacity, carried on the work which involved construction of roads and earthworks.

While in plaintiffs' employment, PW2 assisted the defendants to work out the costing of the project in 1.1 & 1.2 (related to 1.3) which was tendered for, by the defendants. In so doing PW2 had to see the terrain of the land, types of work to be carried out, rates for labour, costing of plant, and cost of materials. He stated that in regard to plant, it was customary to use the sub-contractor's plant, as the sub-contractor would take good care of the plant. In his view there was not much difference in constructing a trunk road *vis a vis* an expressway. At the time the project 1.3 was carried out, he expressed his view that local sub-contractors were capable in doing the work in regard to 1.3.

PW2 also stated that he kept two types of diaries when he worked in the JKR. One was a personal diary giving details of his movement, and the other was a diary kept at the site work. He recorded in his diary, details of his daily work, and instructions that were issued to the contractor. He had kept diaries from 1982 to 1986 (AB6 to AB10). These diaries were written in his own handwriting, and he normally made these entries in the evening, or the following day. These diaries gave details of his movement and discussions with persons involved in the said project. These diaries were also alleged to be genuine contemporary documents. PW2's diaries are of crucial importance. These diaries were maintained on a contemporary daily basis throughout his involvement with the project. He stated that on 24 March 1982 plaintiffs submitted to defendants' a proposal in regard to sub-contracting a certain area of the highway particularly at the start and at the end of section 1.3. He stated that plaintiffs also were proposing to do sub-contract work relating to earthworks, drainage, box culverts and other miscellaneous works. However the sub-contract did not materialise.

PW2 stated that prior to the signing of the joint venture agreement, there was no mention of the joint venture making a loss. He received the 1st external budget, on 16 December 1982 about three months after the joint venture was signed. Only then he became aware that the budget would be 107.6% of the tender price of RM69 million. He denied that DW1 told him at the time of drafting the joint venture agreement, that it would be difficult to make a profit, and neither was he told when the joint venture agreement was executed, that the project may suffer a loss, and that the defendants wanted to go into the project to secure a foothold into the local market. Apart from this, at the three meetings plaintiffs had with the defendants on 12 August 1982, 27 August 1982, and 3 September 1982, there was no discussion about profit or loss. At a meeting held on 8 September 1982, DW1 had informed plaintiffs that the profits were distributed over all the rates. PW2 stated that plaintiffs came to the conclusion that the project would be profitable, when the joint venture

agreement was executed. He also stated that local sub-contractors could have done the middle section of 1.3, as there was expertise within the company. PW2 also stated that the local sub-contractors could have been handled by the joint venture staff. For example, Liew Wan Chang was a sub-contractor to TOA – a Japanese Company. Liew Wan Chang could be a direct sub-contractor to the joint venture as their rates were lower than TOA. Furthermore there was no competitive bidding for earthworks, and the sub contracts were awarded to Kumagai Doro and Japanese Blasting Technic directly. PW2 also stated that TOA and Kumagai Doro as sub-contractors should bear the depreciation charges for the plant supplied by the defendants which are related to their respective works, thereby reducing further losses to the joint venture.

In regard to pricing of rates, PW2 gave an example. He stated that after having studied the tender documents where a figure of RM2.65 per cubic yard for earthworks was mentioned, the rate was high compared to plaintiffs' sub-contractor's rate of RM1.60. In fact RM1.60 would be a fair figure, and that would bring a saving of RM3 million.

P12 reiterated throughout his evidence that the project could have been profitable, if local sub-contractors were used and gave his detailed reasons in court, supported by entries made in his diaries, and ended his evidence by stating that the earthworks in the 3rd and 4th budgets were too high, as was the cost of spare parts, not to forget the cost of depreciation of the machinery used.

PW2 was confident that the plaintiffs could undertake the project in question by themselves and had suggested that the defendants assign the said contract to plaintiffs at a cost of about RM67.725 million dollars, or alternatively, plaintiffs to withdraw from joint venture, and be reimbursed for a sum of RM1,500,000. The defendants did not reply to these proposals. PW2 stated that he became aware of the first External Budget of the defendants when DW1 – Mr Koda handed it to him on 16 December 1982. He denied that at the time of drafting of the JVA, Mr. Koda had told him that it would be difficult to make a profit. PW2 added that the plaintiffs were not only not told about the project being not profitable, but defendants also did not state that they wanted to go into the project, to get a foothold into the local construction industry. In fact at the number of meetings held between 26 August 1982 till 3 September 1982, there was no discussion of profit. When told by plaintiffs that there would be a profit on earthworks, drainage, base course, and surfacing, Mr Koda according to plaintiffs replied that the profits were distributed over all the rates. This is confirmed by PW2's entry in his diary dated 8 September 1982. It

reinforced PW2's views that the defendants' were at great pain to conceal the loss factor. PW2's diary makes no mention of the loss factor prior to the execution of the joint venture agreement. The plaintiffs by September 1982, contended that the project would be profitable. In fact PW2 stated that there was a discussion about the profit of the project at a meeting between the plaintiffs and defendants on 8 September 1982, and he was of the view that there would be a saving of about 13 million dollars. In any event there was according to PW2, no talk of the project suffering any losses. The figure of the saving of 13 million dollars was arrived at by doing a comparison study of both figures submitted by plaintiffs and defendants.

Referring to PW2's entry in his diary made on 3 September 1982 – "Finance RM10 million up to end of 1982, Maraputra to stump up RM3 million dollars." It should be noted that this entry was made 10 days before the joint venture agreement was executed. PW2 stated that if they were actually told by Mr Koda, or defendants, that the project would be a loss, the plaintiffs would have as prudent businessman, refused to sign the joint venture agreement, and furthermore how could plaintiffs be asked to contribute RM3 million dollars as capital, if they were told that there was to be a loss?

From the tenor of PW2's evidence and the entries made by him contemporaneously in his diaries, it would support his proposition that when the joint venture agreement came to be signed on 13 September 1982, it was in the form of a fully integrated joint venture and which reflected the plaintiffs' position as active, and joint parties.

A letter dated 1 October 1982 allegedly, emanating from plaintiffs, surfaced during the discovery exercise, and defendants had included this letter in their bundle of documents. Plaintiffs had no such copy of the letter. The essence of the letter was that the plaintiffs would like to withdraw from the joint venture and be reimbursed a sum of RM295,714.29 for past contribution, goodwill and effort, and plaintiffs would assign all rights to defendants in the joint venture agreement. The plaintiffs challenged the authenticity of the document, and asked defendants to produce the original. Defendants denied that they had the original. The plaintiffs called a handwriting expert PW6 – Mr. Siow Kwan Sia who stated in his evidence and report that the purported letter was a forgery (refer to report by PW6 – exh. P67). Defendants made no serious attempt to cross examine the witness, on the conclusions set out in his report. No one was called from defendants' office to give an explanation.

PW3 – Mr. P.H. Chan is a Quantity Surveyor and joined the plaintiffs' company in 1980 and left in 1985. He holds a degree in Bachelor of Science from Singapore University with a combined degree for Building and Quantity Survey. His duties in the plaintiffs' company involved estimation of costs, preparation of tender and progress payments, and dealing with matters regarding contracts. He assisted the defendants in connection with the tender in regard to 1.1. and 1.2. Later in regard to 1.3, he did a detailed study pertaining to the preparation of estimated pricing.

PW3 stated that at a meeting on 8 September 1982 between the plaintiffs' and defendants' representative DW1 – Mr Koda, there was a discussion about profit in regard to this contract. There was also comparison done between plaintiffs' and defendants' cost of 1.3 in regard to pricing. After having done a detailed study, PW3 concluded that the profit for the project 1.3 would be about RM13 million, if the tender price was RM69 million. To this Mr Koda allegedly did not dissent. PW3 also played a part in working out the cost of the budget at RM63 million.

PW3 stated that the defendants sub-contracted certain works to foreign sub-contractors which in fact was not economical, and financially not viable, resulting an increased cost to the project. He illustrated this point by commenting on the sub-contract given to TOA for earthworks.

According to him, TOA did not own plants, neither did they supply spare parts. They were basically labour sub-contractors. In regard to the sub-contract given to Kumagai Doro, PW3 stated that DW1 – Mr. Koda, told him that Kumagai Doro was not doing any physical work except for supervision. PW3 went on to state that sub-contract awarded to Kumagai Doro was superfluous as the defendants could have sent four of their personnel to supervise the local sub-sub contractors who were to do the work in question. He also stated that the rates quoted by defendants were high, compared to rates of local contractors. PW3 also complained of the defendants' inability to provide cash flow statement.

PW3 under cross examination maintained his stand that if the project had been done in accordance with his planning and costing, there would definitely have been a profit.

PW4 – Mr. Richard Ong Guan Seng is a retired accountant cum company director. He is a member of the Malaysian Institute of Accountants, as well as that of the Institute of Chartered Accountants of Australia. He is also a chartered secretary, and a member of the Chartered Secretaries and Administrative London, and has been a practising Accountant since 1966

till his retirement in 1993 from Messrs Pear Marwick Mitchell, a firm of accountants.

He was asked by plaintiffs to look into the accounts and to establish if the expenses of RM100 million, as shown in the accounts of joint venture, were in fact correct, and to ascertain if other expenses were included, which did not relate to the project. He was also asked to do an analysis of the budget, prepared by the joint venture. PW4 at the conclusion of his investigation made a report as stated in p. 1 to 4 of P59A.

He stated that as provided for in cl. 4 of the joint venture agreement, a separate set of accounts should have been kept of the joint venture partnership, but in this case this was not done. In the course of his work PW4 examined invoices, vouchers and receipts, and accounts vouchers of the joint venture project. He had asked for certain clarification pertaining to the expenditure from the defendants, who gave their answers in a general form to specific queries. Consequently since PW4 was unable to satisfy himself as to the explanation given to the queries, he issued a final report with a reservation that the accounts were dubious. He also found that certain Japanese contractors were appointed soon after the joint venture was formed, such as the contracts awarded to Kumagai Doro on 25 September 1982, TOA Construction on 1 October 1982 and Japanese Blasting Technique on 1 October 1982. PW4 stated that the accounts for the period of 13 September 1982 to 30 September 1983 were unavailable for his inspection. PW4 examined the accounts of the malaysian branch of defendants' company for year ending 1983. He stated that these accounts were not confined to the joint venture, but were accounts for the whole of operation of defendants' company.

PW4 in his report lamented, that the extent of his work was hampered due to non-availability of the relevant officer in charge for the records of joint venture account, in assisting him in his inspection. After making a detailed investigation, and having studied all the relevant documents relating to the accounts, PW4 was in the opinion that the estimated cost-overcharged, amounted to RM23,576,000. This sum did not include the doubtful items of RM4.7 million in regard to the fact whether this amount was rightfully charged to the joint venture. PW4 also stated that no details of any control account, were given to him by defendants despite him asking for the same. He further noticed that the project account should be audited by joint venture auditors, and the defendants should treat the project as a separate entity, and should not mix the project income and expenditure with the defendants other projects under the Malaysian Branch.

In fact PW4 confirmed in his evidence of the shortcomings of the draft joint venture account prepared by defendants' auditors for year ending 30 September 1985 to 30 September 1988. These accounts were hardly of much value due to hearsay, and heavy qualifications by the auditors.

PW4 stated that the accounts were prepared based on records and information supplied by the defendants. PW4 commented acidly that there being qualifications of the accounts by the joint venture auditors, it showed that the accounts were not in proper order in regard to verification of major items of purchase, and expenditure, reliability of financial reporting, and effectiveness of the operation of the joint venture. PW4 concluded that consequently, because of these pertinent flaws the draft accounts were not much value. These draft accounts furthermore were not given to plaintiffs by defendants till 24 January 1990.

He stated in evidence, the defendants opened a site account only, and the proceeds of the project were never paid into this account, instead they were paid into defendants' account *vide* general account for Malaysia branch in Kuala Lumpur, as admitted by DW1 – Mr. Koda.

At a meeting between PW2 and defendants on 25 January 1986, defendants informed plaintiffs that the account books were in Japan, and defendants confirmed this fact in their letter dated 29 January 1986, when finally plaintiffs were given access to account books in Kuala Lumpur. It was discovered that the accounts were not of a separate joint venture account but the defendants' account from all their Malaysia projects.

PW5 – Mr. Liew Wan Chang stated in his evidence that he was a sub-contractor and registered with JKR as a Class D contractor. He stated that he was involved in the construction of roads in various parts of the country and specialised in earthworks, and he had his own plant to do the job. He also stated that he had done earthworks relating to a four lane road.

He stated that he was asked by the plaintiffs' company to see them in regard to a tender that plaintiffs intended to apply for. PW5 visited the site on March 1982 at 1.3 from Kuala Kangsar to Changkat Jering on instructions of plaintiffs. He went there with PW2 – Mr Low Nga and two others. His purpose was to give his quotation for earthworks and he was asked to quote the rates in regard to the construction of s. 1.3 from Kuala Kangsar to Padang Rengas. PW5 was retained by the joint venture on 28 October 1982 to do work from chainage 0 to 7400. He stated quite categorically that he had the ability and confidence to complete the works satisfactorily, and was prepared to do other works related to 1.3 if given the opportunity.

PW6 – Mr. Siow Kwen Sia was an expert document examiner. He examined a letter allegedly emanating from plaintiffs to defendants dated 1 October 1982. It purported to state that plaintiffs had agreed to give up their rights to the joint venture to the defendants, and it appeared in defendants' affidavit of document. The plaintiffs alleged that the substance of the letter was a complete fabrication. Defendants informed the court that they did not have the original of the letter dated 1 October 1982. PW6 made a study of this letter dated 1 October 1982 with some other letters from plaintiffs' company bearing the plaintiffs' letter head, and signature of the Director Datuk Haji Mohd Azuddin.

After examining the said letter and other documents, PW6 came to the conclusion that the letter dated 1 October 1982 was a forgery.

PW7 – Mr. Jaginder Singh is a Consulting Engineer who is a Registered Civil Engineer for 35 years and has practised his profession in United Kingdom, Singapore, and Malaysia. He was a Director of a firm of Consultants and also an Associate member of the Chartered Institute of Arbitration London.

PW7 had visited the site 1.3 in Jun 1996 together with three of plaintiffs' personnel. He had also studied the layout plan for 1.1, 1.2, and especially 1.3, and was asked to give his opinion:

1. on local sub-contractors ability to do work executed under the contract.

2. Plant/Labour components of unit rates for executing earthworks.

3. Final measurements of earthwork quantities for payments.

PW7 stated in evidence, and his report that in 1982, there were a number of local sub contractors executing highway projects and they had adequate plant, and equipment, suitable for such works. Therefore in his view, the hiring of foreign sub-contractors as in this case was extravagant, and wasteful. In fact he stated that an experienced local sub-contractor under the main contractor's supervision could have successfully done this type of work within a reasonable time, and at a very competitive price. In his view, local sub-contractors were competent to build the highway, but had difficulty in raising the security bond.

Under cross examination, PW7 reiterated his evidence that there was no necessity to employ foreign sub-contractors. PW7 spoke from experience as he has been involved in the construction of a number of roads and the Kuala Lumpur – Karak Highway project, where he was personally responsible for related measurements of quantities for final valuation of contract.

Defence

For the defendants, four witnesses gave evidence. The principal witness, DW1 – Mr. Koda stated that he was a civil engineer, qualified surveyor, and an air pollution controller. He was the project manager of 1.3 at the relevant period. He stated that apart from 1.3, he had worked in other projects involving highway, waterworks, tunnel, and condominium construction, and had been working with the defendants' company for about 28 years. He stated that the defendants' company had consruction projects in various parts of the world. He stated that the defendants were willing to tender for a project, even if it may suffer a loss, because the defendants wanted to establish a base in this country. He stated that one Mr Sano prepared the estimate for 1.3. which amounted to RM89 million. DW1's own estimation for 1.3 was RM80 million, and defendants tendered for the project at RM69.18 million. Defendants at best hoped to break even. According to him, the defendants intended to sub-contract to Japanese sub-contractors certain works relating to earthworks, blasting works, and pavement works. This step was taken because defendants had no prior knowledge of the capabilities of local sub-contractors.

The tender for 1.3 was awarded to defendants at RM69.18 million. He stated that defendants started the overall planning of 1.3 in June 1982 and had sought the help of plaintiffs in regard to quarries, dumping area, and culverts related to local market. The sub-contractors employed were TOA Construction for earthworks, Japanese Blasting Technique for blasting works, and Kumagai Doro, for pavement works. The last is a wholly owned subsidiary of the defendants' company. He stated that he had informed the plaintiffs through Mr. Low Nga sometimes in August /September 1982, that he was going to employ Japanese sub-contractors in regard to earthworks, blasting works, and pavement works. He stated that Mr Low Nga did not make any response. Defendants completed the detailed planning of the work with the Japanese sub-contractors in January 1983. He stated that he did not discuss the details of the plans with Mr. Low Nga before the plan was finalised. After completing the planning, he explained the plans to Mr. Low Nga in January/February 1983.

DW1 stated that prior to the execution of the joint venture, there were a number of discussions between plaintiffs and defendants. At these discussions, DW1 explained that defendants did not expect to make any profit from the project, and would absorb any losses. Defendants proposed a dormant partnership to which the plaintiffs refused.

According to DW1, defendants were responsible to complete the project, and to minimise the cost, and do a quality job. The plaintiffs were to assist the defendants.

Prior to the joint venture being executed, plaintiffs requested DW1 for the tender prices, and he supplied these to the plaintiffs in September 1982. He also claimed to have no knowledge of the diaries of Mr Low Nga, except prior to him giving evidence in court. He could not recollect that plaintiffs told him that there would be a saving of RM13 million on earthworks, base course, surface course, drainage and miscellaneous items. He was also asked by PW3 – Mr. P.H. Chan how the profit was being distributed, and DW1 replied that the profit and overheads would be distributed on all major items. He admitted that although he realised that 1.3 would not be profitable and told plaintiff so, he failed to record the matter in writing, and admitted that the fault was his.

DW1 stated that because there was a delay in the working capital from Lembaga Lebuhraya Malaysia, the defendants provided the working capital through their head office in Tokyo. DW1 stated that the estimate for the 2nd budget by October 1982 was RM74 million. The project finally cost to more than RM100 million due to extension of time, addition of plant and machinery, design changes, climatic weather and site related matters, and depreciation cost of items used in the project.

In regard to earthworks, TOA a Japanese company was employed as a sub-contractor. In regard to depreciation cost of machinery used by TOA, the depreciation cost of the machinery was not included in the rates submitted by TOA, otherwise DW1 stated TOA's overall rates could be higher.

DW1 also stated that he did not inform Mr. Low Nga that the contract sum did not include plant, depreciation, local sub-contractor's plant, and cost that had to be deducted.

According to DW1, TOA employed local staff for supervision and also employed local workers for plant operation, drainage and general labour. The same procedure was used when a wholly owned subsidiary company of defendants – Kumagai Doro was employed as sub-contractor, to execute the pavement works. The contract with Kumagai Doro was a negotiated contract.

In regard to the employment of Japanese Blasting Technique, it was a company specialising in blasting. They also, were employed under a negotiated contract basis, and like all the other sub-contractors, employed local staff.

DW1 also stated that plaintiffs had asked to be assigned the contract at RM67 million, and alternatively, be paid RM1.5 million for their withdrawal from the joint venture, but defendants did not agree to plaintiff's proposal. DW1 also testified that in the course of 1.3., he was shown the estimated cost for 1.3 with the main contract and the price by Mr P.H. Chan. The plaintiffs' estimate for the contract was RM63 million. DW1 also stated that he gave the plaintiffs full access to the accounts and other records of the project.

DW1 admitted quite candidly that looking back in hindsight he thought he could have reduced the cost, but he did not think the project would have made a profit. He also stated that he was surprised about Mr. Low Nga's recording the daily events in his diaries.

DW1 went on to state in his evidence that he met the late Dato' Mustaffa of the Lembaga Lebuhraya Malaysia in 1992/93, and the deceased had told him that the Lembaga estimate of the project at the time of tender was RM91 million. Under cross examination, DW1 stated that he did not know the basis as to how Lembaga Lebuhraya Malaysia came to that estimate, and whether the estimate included cost of land acquired for the project, and cost of local and foreign consultants and its own expenses.

DW1 testified that all the Japanese sub-contractors worked under the defendants' umbrella, and he agreed that the fact of their employment as separate sub-contractors, was not brought to the notice of Lembaga Lebuhraya Malaysia.

Under cross examination, DW1 stated that he did not think that by using Japanese sub-contractors, it would increase the cost of the project, except that in the case of local sub-contractors, overhead expenses may be less than Japanese sub-contractors. When DW1 had prepared his budget, he stated that he was of the view that at the best 1.3 would be a break even undertaking. Under cross examination DW1 admitted that he did not show the 1st internal budget of 74.28 million to the plaintiffs, even though the plaintiffs were the defendants' partner. He only gave a copy of the budget to the plaintiffs on or about 16 December 1982. DW1 stated that plaintiffs never accepted any of the defendants' budgets and constantly queried all the defendants' budgets.

DW1 stated in his evidence that he did not pay much attention to the details of the estimated budget, as prepared by Mr. P.H. Chan, because he did not think that local contractors had the capability. He also came to the conclusion that Mr. P.H. Chan had undervalued the cost of 1.3 even though he did believe that P.H Chan had the qualification to come up with the estimate of 63 million.

He testified that he had made certain calculations in regard to the rates applicable to the work that was to be done by Japanese sub-contractors. He did not give a copy of their rates to the plaintiffs because his head office asked him not do so. His reason was that since plaintiffs already knew that all losses would be borne by the defendants, there was no necessity for plaintiffs to know about the rates applicable in regard to the various contracts. DW1 denied under cross examination that he deliberately concealed the true facts in regard to the rates of the TOA sub-contract, when TOA started their work as sub-contractors.

DW1 stated in his evidence that TOA and the local sub-contractor Mr Liew Wan Chang were in different category of construction expertise, but gave no detailed reasons for his belief.

DW3 – Mr. Yoshimasa Fujishiro was the third witness for the defendants. He is an accountant by profession and has been working for the defendants' company for the past 19 years. He was involved in s. 1.3 as an administrator and accountant, and was duly appointed in September 1982. He left Malaysia at the end of February 1986.

As an accountant, he was responsible for setting up and maintaining the account system for 1.3, particularly keeping all account records, receipts payment from Ipoh – KL, Japan and also to prepare payments authorised by the project manager. All records of account were kept in Ipoh according to him.

He stated that he was asked by DW1 – Mr. Koda to keep a tight control of cost and to minimise expenses. In the course of 1.3, several budgets were prepared, but he was not involved in that exercise. According to him, the accounts were audited every year, but he was not involved in the preparation of the draft audited accounts from 1985 to 1988 and 1989 to 1991.

Under cross examination, he stated that after he left the project in 1986, he was not called back to audit the joint venture account. All accounts were controlled by Kuala Lumpur office and monthly reports were sent to Ipoh for price costings ie, actual expenditure.

He agreed with the evidence of the plaintiffs' witness Mr. Low Nga that the main account books were kept in Kuala Lumpur together with the originals of account books such as original invoices, receipts, and monthly reports. DW3 also confirmed in his evidence that it was difficult for Kumagai Gumi to keep a separate account on the joint venture, because the Kuala Lumpur office kept a collective account for all projects in Malaysia.

He agreed however that under the joint venture agreement, there should be a separate account. He was cross examined in regard to the fact that the account relating to joint venture projects in Malaysia referred to Dayabumi and UMNO Complex but the accounts did not mention about the 1.3. He was unable to give any explanation for this ommision. He also stated that he was not in a position to verify the fact whether the project 1.3 would be profitable on an independant basis.

DW3 also stated under cross examination that he did not furnish the cash flow statement because the plaintiffs did not make any contribution, and secondly he thought plaintiffs had no intention to do so. He added that defendants had asked only once in writing on 3 September 1982, for the plaintiffs to make a contribution of RM3 million towards the joint venture.

DW3 further confirmed that the Japanese sub-contractors employed local sub-contractors to do the work and mentioned Mudajaya Construction as an example.

The last witness for the defence was DW4, K. Kumarasivam a retired consulting engineer who stated that after carrying out a study of the project 1.3., he concluded that the cost would be about RM92 million at the rate of RM4.3 million per kilometer. He arrived at this figure after comparing the cost of such other projects. He also analysed the data from the Highway Authority as to their cost of various structural works carried out by them. These costs were then reduced to 1982 prices by applying the building cost index produced by the Statistic Department. His comparison with other similar Highway projects were from details of projects from 1989 to 1992. He concluded by stating "I do not think any contractor could made a profit for 1.3. on a tender sum of RM69 million".

Under cross examination, DW4 stated that he was supplied the tender drawings by the defendants, but not the plaintiffs' budget. He stated that he has had some experience in the construction of a two lane road in Terengganu, as well as the construction of four lane road in a housing estate.

In regard to the cost factor, he testified that it depended on the terrain. He did not do a mass haul study for 1.3., although he admitted it was important to do so. He prepared a general indication budget for 1.3. and his figures, he admitted were raw figures, and further added that he did not do a comparative study of the plaintiffs' budget figures *vis a vis* 1.3.

In his evidence under cross examination, he admitted that he could not get the tender figures for the Seremban and Gurun to Alor Setar Highway, and admitted that the tender prices for Highway Construction before 1988 would be more helpful and relevant to the cost of 1.3. PW4 further admitted that in his study regarding the costing of Highways, there was an enormous difference when he stated that the average cost per km is RM5.71 million to RM17.15 million.

When cross examined in regard to cost of building index, he admitted that there are fundamental differences in the construction of buildings *vis a vis* highway construction. He was not aware that there existed a cost of Labour index in the statistic department. In any event, the materials used to construct building may vary from those used to construct highways. He stated that the object of his exercise was to give an indicative figure, and admitted quite candidly that the figures are not accurate absolutely, and stated that the cost of building index is not an accurate method. When told by plaintiffs' counsel that if his costing method were to be employed, the 1.3 would cost between RM122.265 million and RM161.67 million, PW4 offered no credible explanation.

When cross-examined by plaintiffs' counsel as to whether it would increase the cost factor if one employs a foreign sub-contractor, DW4 added that it would. However, he had not made a study of the project in terms of employment of foreign sub-contractors and the cost factor, if a contractor brings in plant from abroad to do a project. However he stated that this could add to the cost of the project.

DW4 concluded his evidence by admitting that he did not go into great depth in regard to rates, and other details of the 1.3. project. He reiterated that the cost of building index was the only available information he had. It was an indicator to give him an idea whether his estimate was in the right direction.

Submission By Plaintiffs' Counsel

Counsel for the plaintiffs submitted that plaintiffs wanted a genuine joint venture, but the defendants never accepted plaintiffs as joint venture partner, and also did not fulfill their fiduciary obligation as partners. The joint venture he submitted represented the true and only agreement between the partners at the relevant period. This view was fortified by the policy of the government and the contract entered into between the defendants and Lembaga Lebuhraya Malaysia. Neither party could withdraw from the joint venture without the approval of Lembaga Lebuhraya Malaysia.

Counsel submitted that it was never the intention of the defendants to admit the plaintiffs into the management of the joint venture, and that the defendants managed the entire project without reference to the plaintiffs, and ignored the plaintiffs' right as joint venture partners. It was contended by counsel that the joint venture agreement amounted in law to a partnership. At the point when the joint venture agreement was executed there was no written or oral agreement, to release the plaintiffs from their obligation under the joint venture agreement. Such an agreement to indemnify the plaintiffs was only executed on 7 July 1984 and confirmed on 23 December 1985. Further, there was a side letter dated 24 December 1985 executed between the parties entitling the plaintiffs to a share of the profit in accordance with the principal agreement without any regard to the supplementary agreement. It was agreed that the joint venture agreement subsisted till the end of the project. The defendants, although, should have had regular joint venture management meeting, only did so upon plaintiffs repeated request on 10 July 1984, and in fact only three meetings were held.

Counsel went on to submit that there was lack of consultation between defendants and plaintiffs on the appointment of sub-contractors particularly TOA, Kumagai Doro and Japanese Blasting Technique, and this resulted in unjustified expenditure. Further, defendants signed sub-sub contracts with local contractors without the knowledge of plaintiffs, and when plaintiffs requested for details of the sub-contracts, defendants deliberately delayed giving such information. In fact counsel submitted that DW1 – Mr Koda stated that since defendants were supplying the finance, the cost of the project was no concern of plaintiffs.

Counsel stated that in regard to the sub-contract with Kumagai Doro, a wholly owned subsidiary of defendants it was not awarded at arm's length, and was not *bona fide*. Defendants did not supply the details of the contract to plaintiffs till 1 November 1984 and there was a great inconsistency between the rates awarded to Kumagai Doro *vis a vis* local contractors.

It was also argued that there was a vast difference between the 1st Internal Budget of RM69 million and the ultimate cost of this project, which amounted to RM99.6 million. Counsel submitted that the increase in the cost was totally unjustified.

Counsel also submitted that the defendants are bound to give proper accounts to the plaintiffs and in not doing so, there was wilful default on the part of the defendants. In fact it was argued that there were no proper accounts for all the financial years, and this in fact delayed the plaintiffs in filing their suit. In any event, when the accounts were finally supplied, they were heavily qualified by the accountants.

Counsel referred to the evidence of PW4 – Mr. Richard Ong, who was appointed to examine the accounts, and to investigate whether he found the figure of RM100 million was justified in regard to the construction of this project. The defendants it appears, did not give answer to certain queries raised by Mr Ong, who after having examined all the information supplied to him, concluded that the cost of the project would be about RM72 million.

In regard to the issue of fiduciary duty owed to plaintiffs by defendants, counsel stated that the defendants had breached the joint venture agreement, and deliberately tendered at a low figure for its own policy, of gaining a foothold, and at no time informed plaintiffs that the project would end up in a loss. Furthermore once the project commenced, defendants failed to provide vital information to plaintiffs in regard to the execution of the joint venture project.

The defendants treated the joint venture agreement as a dormant relationship rather than a real joint venture, and did not give credence to the government policy for local equity participation. In short, defendants ignored plaintiffs' right as partner, when in fact the joint venture agreement stated that both parties would endeavour to ensure joint venture project monies be profitable.

Counsel submitted that since there was a breach of fiduciary duty, an account should be ordered, and alternatively the court could give equitable compensation in the form of damages on a jury basis. Since the defendants admitted that the records of the project had been destroyed, damages would be a more suitable remedy. There was as counsel stated, ample evidence for the court to act on this, as it was demonstrated by plaintiffs' evidence that the project would be profitable bearing in mind that its budget of RM69 million.

Counsel also submitted that the former Chairman of Lembaga Lebuhraya Malaysia Dato' Mustapha alleged statement to DW1 – Mr. Koda, should be disregarded, and no weight should be placed on the alleged estimate of the project given to DW1 by Dato' Mustapha who has since passed away and no reasons were given as to how he arrived at the figure.

In regard to the evidence of DW4 – Mr K. Kumarasivam, it was submitted that his testimony was of little value as he did not study defendants' budget, operational plan, or any other project documents including defendants' construction programme. He had arrived at his estimates based on unsubstantiated evidence. His testimony that he took the cost of building

index in regard to construction costs led him to state that the cost of building a highway could vary between RM5.71 million to RM17.15 million per kilometer. The huge difference alone rendered his evidence pregnant with too many permutations, as building cost is relevant to JKR building contracts, and does not cover escalation of labour costs nor cost of major components, and has no relevancy to civil engineering works, particularly roadworks. Counsel added that the best person to comment on cost of building roads would be civil engineers, quantity surveyors, and experienced contractors. DW4 had admitted that there are local pavement contractors available in Malaysia. In conclusion, counsel submitted that DW4's evidence was too vague and unsubstantiated. Counsel submitted that since the 1st Internal Budget had a cost of RM68.27 million according to plaintiffs'calculation, a substantial saving could have been made without employing Japanese sub-contractors. It was therefore difficult to compare the above mentioned estimate with that of Mr. Sano's estimate of RM89 million. The budget was never discussed at any management meeting, where the cost factor might have been reduced after discussion. Bearing in mind plaintiffs' estimate of the project was RM63 million and plaintiffs were prepared to take over the project in 1982, showed the plaintiffs were earnest. Furthermore, plaintiffs were experienced roadworks contractors and has assisted defendants in the costing of 1.1 and 1.2.

Counsel went on to submit that the plaintiffs throughout their case stated that it was totally unnecessary to engage Japanese sub-contractors, when in fact these sub-contractors employed local contractors to carry out their work. An example of this was when TOA engaged local contractors Mr Liew Wan Chang and Mr Chan Fook to do the earthworks, and also when Kumagai Doro appointed Muda Jaya Construction to do the pavement works. Furthermore the plaintiffs were not consulted prior to the appointment of the various Japanese sub-contractors, who were appointed a few days after the joint venture agreement was executed. These sub-contracts were executed without the knowledge of the plaintiffs, and the delay in giving details of rates applicable to these sub-contracts appear to be deliberate and with a sinister motive. Furthermore, these sub-contracts were negotiated contracts and not by competitive tender.

Counsel stated that the sub-contract with TOA was vague, and no mention was made as to who would bear the cost of depreciation of plant used in the contract. In the case of sub-contract with Kumagai Doro which was a wholly owned subsidiary of the defendants, there was lack of transparency, and consultation. The details of the rates were given to plaintiffs about two years after the joint venture agreement had been signed. The rates applied were also higher than rates of local contractors.

In regard to the defence of limitation, laches and acquiescence, counsel submitted that initially only limitation was pleaded. The other two defences were added in May 1997.

Referring to laches, counsel submitted that it did not apply to breach of contract cases, and he went on to submit that the defence of acquiescence would also fail. Reference was made to the case of *Alfred Templation v. Low Yap Holdings* [1989] 2 MLJ 202 and *Lindsay Petroleum v. Hund* [1874] LR 5 p. 221. Any delay in filing the writ was due to the conduct of the defendants in not furnishing plaintiffs with the final audited accounts. Any prejudice suffered by defendants, due to the delay was their own fault, as they had no business in destroying the relevant documents, particularly when the audited accounts were not finalised.

In regard to limitation, the plaintiffs issued the writ on 12 January 1990. He submitted that the breaches by the defendants were continuous since 1982, till the issue of the writ. The breaches were manifold such as failure to hold meetings, and to give proper accounts. Counsel further submitted that nothing in the Limitation Act should affect any equitable jurisdiction to grant relief, particularly if the court finds in favour of the plaintiffs, then in law a constructive trust applies. Counsel referred to the case of *Matai Industries Ltd. v. Jenson* 1 New Zealand Law Report p. 525. In regard to breaches of fiduciary duty which occured before 1984, counsel stated that they would not be barred because of the application of the estoppel principle. He referred to s. 32 of the Limitation Act which states that nothing in the said Act should affect any equitable jurisdiction to gain itself on the grounds of acquiescence, laches, or otherwise. Laches he submitted only applied where there was no statutory bar. Refer to *Halburys Laws of England* vol. 16, 4th edn. Laches he submitted works towards conduct of parties, and is flexible and distinct to the law of Limitation. If the court finds the essential facts in favour of the plaintiffs, then in law a constructive trust would apply. Counsel referred to the case of *Lindsay Petroleum & Anor* [1874] LR 5 p. 22. The evidence of PW1 is pertinent on the issue, when he stated that although there was a delay in filing the writ, this delay was due to the non-availibility of the final accounts. In any event, counsel submitted that any prejudice suffered as a result of the delay, is the defendants' fault because they should not have destroyed the documents, when in fact the final account was still pending.

Counsel then submitted on the issue whether plaintiffs could have withdrawn from the joint venture unilaterally. PW1 in his evidence stated that he took legal opinion in the mater and was informed that plaintiffs could not withdraw unilaterally from the partnership. In regard to the

alleged letter written by plaintiffs dated 1 October 1982 stating that plaintiffs were willing to pull out of the joint venture upon payment of a sum, an expert witness had stated in evidence that the letter was a forgery and this evidence was not challenged.

Submission By Defendants' Counsel

Mr. Lambert in reply joined issue with plaintiffs' statement of facts in that the defendants were awarded a contract to construct the Highway 1.3. by the Lembaga Lebuhraya Malaysia and pursuant to that, the plaintifs and defendants entered into a joint venture agreement. It was submitted by counsel that plaintiffs were not involved in the execution of the said project, and left it to the defendants to select their sub-contractors. Furthermore, plaintiffs did not make any contribution towards the cost of the project and all losses were absorbed by the defendants. In addition, plaintiffs were given restricted access to the records and accounts of the project as plaintiffs lost nothing in participating in the joint venture, and in fact profited tangibly and intangibly at the expense of the defendants, and even made a small profit of RM700,000 counsel enumerated the following issues as that which concern the plaintiffs' claim.

i. Pre joint venture disclosure on profit taking.

ii. Statement that defendants managed the project without reference to plaintiffs.

iii. Allegation of failure to provide audited accounts.

iv. Management of accounts.

v. Plaintiffs awareness prior to execution of joint venture on the appointment of Japanese sub-contractors.

vi. Allegation as to whether Japanese sub-contractors were unnecessary.

vii. Whether plaintiffs was aware of final position with regard to claims to Highway Authority.

viii. Whether defendants was the sole contractor.

ix. Deals with account books.

x. Deals with whether payments to Japanese sub-contractors were properly recorded.

xi. Whether defendants maintained a separate bank account.

xii. Whether another audited account was provided for 1983.

xiii. Meetings of joint venture.

xiv. Defendants response to auditors' letter.

xv. Inspection of machineries.

xvi. Importation of machineries at inflated price.

It was argued by the counsel for defendants that the parties to the joint venture had no common intention to make a profit, as the defendants tendered for the project not with a view of making a profit, but wanted to procure a foothold in the road construction industry in Malaysia, and had in fact conveyed this view to the plaintiffs prior to the execution of the joint venture agreement. It was also argued by counsel for defendants that the joint venture between the parties was not as partners, but joint ventures simpliciter, as referred to in the case of *Sinnathamby s/o Klondakoundan & Ors v. Brijkishore s/o Shuparshad* [1997] 4 CLJ 568; [1998] 1 MLJ 31. Therefore, counsel argued the plaintiffs could only bring a claim for breach of contract.

Counsel argued that the plaintiffs did not show good faith in dealing with the defendants as plaintiffs had consulted lawyers and accountants in the dealings with the defendants, including the drafting of letters from the plaintiffs to the defendants, in the course of the project. He stated that the plaintiffs' counsel argument was part of a preconceived agenda to harass the defendants from the outset, into paying an increasing avaricious plaintiffs' monies, that they were not legitimately entitled to.

On the issue of laches, counsel submitted that since plaintiffs were aware after the joint venture agreement was executed, that the project would not be profitable when it received the defendants first budget, shows clearly that plaintiffs "slept" of its rights and only "awoke" of its rights seven years later. Therefore, laches should bar the raising of this claim. He also stated that equity will also invoke laches where a party seeks to invoke its rights after a considerable lapse of time, where the effect would be to re-open dealings and arrangement, particularly when large sums of money were paid, and extensive arrangements carried into effect.

Furthermore, plaintiffs accepted defendants indemnity and stood by, and watched at no cost to itself, as the defendants singularly picked up the substantial loss made on the project.

The next point counsel for defendants touched on was the defence of acquiescence. Counsel argued that if plaintiffs felt deceived into entering the joint venture agreement, plaintiffs should have taken steps to rescind the agreement and not continue to affirm it. Plaintiffs by their conduct are deemed to have acquiescenced, and are estopped from raising the issue.

Counsel however admitted quite candidly that the defendants alleged statement to plaintiffs that the project would be a loss, and that defendants wanted to get a foothold into the construction industry in Malaysia, was never put into writing by defendants.

It was counsel's contention that defendants had nothing to gain by suppressing its position in regard to the profitability of the project, prior to the execution of the joint venture agreement. Even if plaintiffs' evidence is to be believed on this issue, the plaintiffs counsel submitted they never sought on an explanation from the defendants in regard to the non-profitability of the project, and plaintiffs continued with the joint venture. Counsel stated that plaintiffs had nothing to lose by entering with the joint venture, and did not lose a single cent.

Counsel argued that defendants conveyed to plaintiffs the issue of indemnifying the plaintiffs against all losses prior to the execution of the joint venture, and not on 3 February 1983 as stated by PW1 in his evidence.

Counsel also submitted at length in regard to plaintiffs' contention that the project would be profitable. He stated that plaintiffs' witnesses did not give any reasonable or cogent reasons for arriving at the conclusion that this project would be profitable.

In regard to using Japanese sub-contractors, counsel submitted that this was done because defendants did not know about the capabilities of local sub-contractors, but knew about these Japanese counterparts, as they were aware of their capabilities having worked with them in Japan and Indonesia. As such, they had confidence that these sub contractors could execute the works entrusted to them.

Counsel stated that plaintiffs must be barred by limitation, laches and acquiescence from raising the issue about not been aware in regard to the employment of Japanese sub-contractors as they had allegedly been informed of this fact by defendants on or before 16 December 1982 – over seven years before the claim was filed.

Counsel submitted that the defendants' decision to employ Japanese sub-contractors were made in good faith, and in the best interest of the project. As this was a management decision, it should not be questioned. He also submitted that there was no credible evidence to show that the appointment of Japanese sub-contractors had any material impact on the final cost of the project.

Counsel also submitted that the plaintiffs' estimate for the said project of RM63 million is not credible. Among the reasons given was that this budget was not forwarded to the defendants at an early stage, and the plaintiffs did not have the expertise to estimate the cost of the project. Therefore no weight should be place on this budget document.

Counsel also stated that the plaintiffs' objection to the leasing of plant machinery from Nishio Lease Singapore Ptd Ltd was also not valid, and since plaintiffs were allegedly aware of this fact by 15 January 1983, they are precluded from alluding to it due to limitation, laches and acquiescence. Counsel also denied that the defendants acted on its own interest, and the interest of the Japanese sub-contractors who worked under the umbrella of the defendants for the project. Counsel also stated that numerous joint venture meetings took place between plaintiffs and defendants.

In regard to the cl. 5(e) of the joint venture agreement referring to the preparation of the accounts, counsel submitted that joint venture accounts were audited annually. This issue also, stated counsel is barred by the defence of limitation, laches and acquiescence. A further point was made that there was a separate joint venture bank account operated by the defendants in their name. It was further submitted that full access was given to plaintiffs in regard to the accounting records, although contractually, defendants were under no obligation to provide the monthly management accounts.

Counsel also submitted that defendants were entitled to a set-off against plaintiffs' claim if any, and counterclaimed the sum of RM11,954,430 against the plaintiffs' claim. Counsel submitted further that plaintiffs' claim is barred owing to limitation, laches and acquiescence.

Conclusion

In the light of the evidence adduced in court, it is not disputed that the plaintiffs and defendants signed a joint venture agreement on 13 September 1982 in regard to the construction of a Highway, referred to as package 1.3 of the Ipoh North South Toll Expressway. This joint venture agreement was signed between the parties as the Lembaga Lebuhraya Malaysia ("the

Employer") informed the defendants that it was a term of the award, that defendants form a joint venture with a local contractor (registered under Class A with the Ministry of Works and Public Utilities) holding a minimum equity interest of 30% in the joint venture. Under the terms of the joint venture agreement, defendants were alloted 70% and plaintiffs 30% share. At a later stage, defendants indemnified the plaintiffs against any losses arising from the project sometimes in November 1985 *vide* a supplementary agreement between the parties just prior to the completion of the project. The date of the commencement of the project was 19 October 1982, and the date of the completion was 18 April 1985. The defendants agreed to take the plaintiffs as a joint venture partner in line with the policy of the Government of Malaysia.

Having perused the joint venture agreement in detail and having had the benefit of both counsel's submissions on this issue, it is my considered view and opinion that the effect of the terms of the joint venture agreement was to create a partnership between the parties.

A partnership as stated in the Partnership Act 1981 s. 3(1) is "the relationship which subsists between persons carrying on business in common with a view of profit". It cannot be denied that both parties entered in the joint venture agreement in furtherance to, and for a business transaction, although it was argued strenously by the defendants that they were interested to secure a foothold in the construction industry in Malaysia and did not care if any profit would accrue as a result of this policy. In the absence of any cogent and reasonable explanation, the court is entitled to conclude that the parties at the very least entered into the joint venture, with a view to try and make a profit.

The joint venture is bound by the same terms and conditions in the principal contract between the defendants and Lembaga Lebuhraya Malaysia, and the joint venture is responsible for the execution and completion of the project. Among the various clauses in the joint venture agreement is a claim relating to accounts, in particular the operating of a separate joint venture account, to be audited by the joint venture auditors, and the final audit of the accounts to be audited, after the completion of the main contract. Neither party could withdraw from the joint venture without approval from the Lembaga Lebuhraya Malaysia and the other party. Both parties were under an obligation to use their best endeavour to ensure that the joint venture shall work profitably, and shall keep each other fully informed on all matters. Although the defendants wanted a joint venture in name, in order to comply with the Lembaga Lebuhraya Malaysia's condition precedent, the plaintiffs wanted a genuine joint venture.

In this respect, the entries made by PW2 – Mr. Low Nga in his diary appears to support the plaintiffs' contention that the plaintiffs were interested in an actual joint venture participation or nothing at all, contrary to the defendants' contention that the plaintiffs role in the joint venture was that of a dormant partner, more so, as the defendants had agreed to indemnify the plaintiffs against any losses.

In appreciating the evidence, bearing in mind the conflicting allegations made by the plaintiffs' witnesses *vis a vis* defendants witnesses, I have had recourse to refer to the contemporaneous documentary evidence against the surrounding circumstances, and the probabilities of the case.

In this case the evidence of PW2 was materially consistent both orally and supported by the various entries made by him in his diaries contemporaneously.

The issue whether plaintiffs became aware that the project would make a loss prior to the signing of the joint venture agreement, became a critical factor. It is not denied that the defendants held back the budget from plaintiffs, and failed to declare certain material facts to the plaintiffs. This issue is tied up with the contention by the defendants, that they orally informed the plaintiffs that they were keen to get a foothold into the construction industry in Malaysia and therefore tendered on the basis of not making a profit, but on a basis of incurring a loss.

The evidence of PW1 – Mr. L.T. Wong was quite unequivocal on this issue. He stated that he only became aware of the cost of the project to be RM69 million when he was told orally by Mr. Koda – DW1, after signing the joint venture agreement, and DW1 never told him when the joint venture agreement was drafted, that it would be difficult to make a profit, and that defendants were prepared to suffer a loss. He went to add that the defendants at no time told the plainttiffs that the project would be a loss. If so plaintiffs would not have entered into the joint venture agreement. In fact according to PW1, Mr. Furata who worked for defendants told him that the highway project would be profitable. Furthermore, PW1 stated that upon analysis of the 1st and 2nd external budgets, the plaintiffs concluded that the project would be profitable. Plaintiffs arrived at this conclusion after doing a comparative study of both the figures submitted by plaintiffs and defendants. When told about this matter of profit, PW1 stated that Mr. Koda – DW1 nodded his head. However DW1 – Mr. Koda has denied making such a statement to PW1.

After examining the surrounding evidence and correspondence ie, plaintiffs' letter dated 31 December 1982 and 18 December 1984, and defendants' letters dated 5 November 1980 and 7 July 1984, it would appear that defendants have been less than candid in making their views in regard to the profitability of the project, known to the plaintiffs.

Having perused the evidence on this issue both oral and documentary, I hold that the defendants failed categorically to inform the plaintiffs that the said project would not be profitable. To my mind, no company would have willingly entered into a joint venture agreement, knowing that there was no opportunity for making a profit, more so if they had been informed by a partner that it would be a loss making project. To my mind the defendants deliberately concealed this fact of the loss from the plaintiffs, in order to induce them to enter into the joint venture agreement. This fact was clear, and they intended rightly or wrongly, to secure a foothold into the construction business in the country, and were prepared to do so at a loss.

The defendants also transgressed certain vital clauses relating to the joint venture agreement, namely opening a separate project account to be audited by joint venture auditors. The defendants also deliberately held back vital information from the plaintiffs in regard to the budgets, appointment of Japanese sub-contractors and generally treating the plaintiffs disdainfully. There was a classic case of "David and Goliath", a multinational company bulldozing its way, without any regard for the position of a local partner.

To state that the plaintiffs have eventually indemnified against all losses, does not absolve the defendants from its fiduciary duties. By holding back the budgets from the plaintiffs, and not disclosing material facts to the plaintiffs, the defendants fraudulently induced the plaintiffs into the joint venture agreement in the expectation that the joint venture would be profitable.

Plaintiffs were entitled to believe as prudent businessman that the defendants as partners in the joint venture would make every effort to maximise profits. There was no reason for any local company to go into this type of joint venture, unless they had something substantial to gain.

On the evidence adduced at the trial, and having considered the issues from all aspects, it is most unlikely that the defendants informed the plaintiffs prior to the execution of the joint venture agreement, that the project would result in a loss. The oral testimony of PW1 and PW2 together with the various entries made by PW2 in his diaries contemporaneously leads me to the conclusion that plaintiffs had no inkling at all that the project would

be a loss. In fact when asked under cross examination as to why the plaintiffs would want to enter into a joint venture if they were informed that it would be a losing venture, DW1 stated that he did not know the answer. He went on to state under cross examination that the joint venture agreement did not state that the defendants would bear the loss in regard to the project 1.3.

The first time defendants acknowledged that they would bear a loss was in the form of a supplementary agreement in 1985. In fact when DW1 was asked under cross examination as to why plaintiffs would want to stump out RM3 million towards the working capital of the project if plaintiffs knew project would be a loss, DW1 replied that he did not know the reason. It stands to reason that the defendants practised a gross deception in not telling the plaintiffs about the losses in this project, so as to induce them to sign the joint venture agreement.

DW1 stated under cross examination that plaintiffs were prepared to contribute their share of the expenses towards the project, if defendants were to provide plaintiffs with the cash flow statement.

Before I go to other aspects of the case, I wish to state that a letter purportedly written by plaintiffs to defendants dated 1 October 1982 was adduced in evidence by plaintiffs' witness PW6 – Mr. Siow Kwen Sia, a handwriting expert who gave evidence in court stating that this letter was a complete forgery. This evidence was not seriously challenged by the defendants' counsel. The gist of the letter was that plaintiffs were willing to withdraw from the joint venture if they were reimbursed with a sum of RM295,714.29 for their contribution towards goodwill and effort, and would assign all their rights in the joint venture agreement to the defendants. Under cross examination, DW1 denied any knowledge of this letter. However, this document was disclosed by the defendants as being in their possession.

This forged letter dated 1 October 1982 would appear to support the plaintiffs' contention that the defendants intention to bring the evidence to the court' attention, was merely to show that plaintiffs had no genuine intention to carry on with the joint venture agreement and more so, not to treat plaintiffs as partner.

An agreement was executed on 17 June 1985 and two supplementary agreements backdated to 20 September 1982. In the first supplementary agreement, the plaintiffs have "assigned all their rights under the joint venture agreement to the defendants'" in consideration of the defendants' indemnifying them against all losses. The second supplementary agreement

purports to cancel the first supplementary agreement, and to restore the plaintiffs' rights as partner in the joint venture agreement. The devious method of doing business, does no credit to the defendants.

A great deal of evidence was led relating to the employment of Japanese sub-contractors, particularly on the issue whether such a course of action by defendants, led to unnecessary and unjustified expenditure.

It is a fact as can be deduced from the evidence led, that the defendants engaged the Japanese sub-contractors without prior consultation with the plaintiffs. It must be borne in mind that these Japanese sub-contractors in turn, employed local contractors to do the work at the site. No details were provided to plaintiffs by defendants on the various aspects of the sub-contracts awarded to the Japanese companies, particularly when the joint venture agreement was signed by the parties. In fact, DW1 stated quite categorically in his evidence that he did not give a copy of the rates to plaintiffs because the defendants' head office had asked him not to show the rates. Eventually when the plaintiffs' did get the details of the sub-contracts with TOA and Japanese Blasting Technique, they found them to be exhorbitant by local standards. When plaintiffs got the details of the rates, they made representation to defendants to renegotiate the rates, to which DW1 replied that it was not possible to renegotiate the rates. However he was prepared to adjust the quantities to give the same result.

PW7 – Mr. Jaginder Singh who was called as an expert witness stated quite emphatically that around 1982, there were a number of local sub-contractors executing highway projects similar to the project 1.3. In his view, local sub-contractors were in possession of adequate plant and equipment to carry out such works. In his view, bearing in mind the nature of the work comprised in this contract, and the stage of expertise acquired by local sub-contractors prior to 1982, experienced local sub-contractors provided with proper supervision from main contractors, could have successfully done this type of work in a reasonable time, and at a very competitive price. In his considered opinion, it was unnecessary and wasteful to engage the services of a foreign sub-contractor in this project. PW7's evidence was not shaken under cross examination. In fact, he gave details of a number of local sub-contractors capable of constructing highways. The only impediment, he stated was the difficulty in raising the security bond.

PW2's evidence on this issue of suitable local contractors capable of doing the work is pertinent. He has had considerable amount of experience in road building, and thus was aware of the ability of local sub-contractors to build roads. In his view, having studied the rates and cost factor, he concluded that the rates applicable to the contract awarded to the Japanese sub-contractors were much higher.

Having reviewed all the evidence on this particular aspect and the cost of employing Japanese sub-contractors, there appears to be ample evidence to justify the plaintiffs' contention, and I hold so that local contractors were competent to perform the sub-contracts and if utilised, there would have been substantial savings in cost. This view I have also formed from the evidence adduced by plaintiffs' witnesses and bearing in mind the evidence of PW4 – Mr. Richard Ong Guan Seng whose evidence was crucial on the cost factor particularly when he stated that the accounts for this project were hardly of much value, due to hearsay and qualification by the auditors. Furthermore, the defendants did not maintain a distinct separate account as stipulated in cl. 5(d) of the joint venture agreement for the project. The evidence of PW1, PW2 and PW3 shows that for a project like 1.3, a number of local sub-contractors available could perform the job. Last but not least, the sub-contracts awarded to the Japanese contractors were not on a competitive tender, and without prior consultation with the plaintiffs. The fact was admitted by DW1 – Mr Koda, that there were no attempts made, to get any competitive rates and terms of the sub-contracts altered without any consultation with the plaintiffs, who were joint venture partners. The rationale behind this appears to be found in the evidence of DW1 who stated "I believe every budget was Kumagai's budget. Therefore I explained how Kumagai would spend Kumagais' money". He went to state that since defendants would bear all the losses, he could not understand why this question of providing plaintiffs with the schedule of rates was important.

It appears to me that the defendants had either forgotten or disregarded these obligations under the joint venture agreement. Neither did any witness come to court on behalf of the Japanese sub-contractors to explain the *bona fide* of his contracts awarded to them.

The plaintiffs all along disputed the various budgets. This could be gleaned from the evidence of DW1 – Mr Koda who stated that "plaintiffs never accepted any of our budgets. Plaintiffs constantly queried our budgets". Although the non-acceptance of budget is not *ipso facto* a case of fraudulent conduct, it does seem to support the plaintiffs' submission that defendants had all along, a hidden agenda in concealing from the plaintiffs the details of the various budgets.

After having heard the evidence both by the plaintiffs and defendants witnesses, certain pertinent features appear to be worthy of consideration. The auditors in their report stated that the accounts have been prepared based on the records and information supplied by the defendants who under the joint venture agreement were solely and exclusively responsible for the

financial and accounting affairs, of the joint venture project. The auditors went on to state that there was no separate joint venture bank account in the name of the joint venture.

Bearing in mind the dispute between the parties to the joint venture, the draft audited accounts in my view were unreliable, in view of the fact that major items of purchase and expenditure were not verified. Furthermore, it was adduced in evidence that the account books were in Japan *vide* letter from defendants dated 29 January 1986. Finally when access was given to the account books in Kuala Lumpur, it was discovered that there was no separate joint venture account, but the defendants' accounts from all their projects in Malaysia.

PW4 who was appointed to establish if the expenses of RM100 million as shown in the joint venture were correct, gave a very detailed report in which he stated that there were lots of irregularities in the accounts relating to the project, among which was overcharging to the cost of the project. He concluded his evidence by stating that a sum of RM23,576,000 had been wrongfully charged to the joint venture cost, and further sum of RM4.7 million was a doubtful cost. Having heard his evidence, and bearing in mind no witness was called by the defence to challenge his findings in a credible manner, I hold that the conclusions made by PW4 stand, unrebutted.

The evidence of DW1 – Mr. Koda, was not corroborated by any documentary evidence in regard to the cost of the project. He appeared to me, to be an evasive witness. His demeanour in giving evidence for the defendants was that of a witness who was "too clever by half." I therefore have serious doubts as to the credibility and reliability of his evidence for reasons given. When questioned on crucial matters such as the sub-contracts awarded to Japanese companies, he would qualify each answer with the words "If I am correct". He gave no credible, or tangible reasons, why Japanese sub-contractors were employed, except to state that the defendants had more confidence in Japanese sub-contractors, than local contractors, when at the same time admitting candidly that local contractors were in fact employed by Japanese sub-contractors to do the works. The role he played in not informing the plaintiffs about the manner in which the sub-contracts were awarded to Japanese companies leaves much to be desired.

This fact was further compounded by his conduct in not giving in good time, the details to plaintiffs of the Japanese sub-contracts. He totally ignored the fact that the plaintiffs were joint venture partners. At the very least, he should have informed his superiors in Japan of the necessity of keeping the plaintiffs' abreast of events.

Although he allegedly told the plaintiffs that the project 1.3 would not be profitable, he admitted that this fact was not put into writing by him. Such a critical fact surely should have been recorded. In any event, he stated in evidence that "looking back in hindsight, I think I could have reduced the cost, but I don't think I could have made a profit".

This witness then stated in evidence that he had a conversation with Dato Mustaffa, a former director of the Lembaga Lebuhraya Malaysia who allegedly told DW1 that the estimate made by his department of the cost of 1.3, was in the region of RM91 million. However, this evidence was not tested under cross examination, and neither did the late Dato Mustaffa tell DW1 the basis of the estimate made by his department which may also include the cost of the land acquisition for the project, plus other related cost. I do not attach much reliance on this evidence for the reasons mentioned above. In fact to my mind this is a "red herring".

DW1 under cross examination stated that in his view the cost of employing local or Japanese sub-contractors would be the same, yet he admitted under cross examination that the rates of Japanese sub-contractors would be higher than local sub-contractors. DW1's only inquiry about local sub-contractors ability was when he spoke to one Mr. Sano who stated that he was not confident about the ability of local contractors. On this slender inquiry and the instruction given by the head office in Japan, defendants proceeded to use the Japanese sub-contractors, totally ignoring plaintiffs' views and opinion about the usage of local sub-contractors who plaintiffs' felt were competent. DW1 prepared a budget for the project at RM80 million. However, no documents were produced as to how he arrived at this conclusion. His reason being that the documents had either been destroyed or lost.

DW1 under cross examination stated categorically when questioned, that he could not think of any reason why plaintiffs would want to join the joint venture, if they had been informed at the outset, that this project would be a loss, more so defendants were not interested in any other joint venture except in the project 1.3. DW1 even admitted that the joint venture accounts were not audited till 1984.

DW1's further assertion that all the Japanese sub-contractors were under the umbrella of Kumagai Gumi (defendants) was in my view, a deception practised on the plaintiffs by the defendants. Apart from not keeping the plaintiffs abreast of events on this issue, there were virtually lack of consultation as to the details of appointment of the Japanese sub-contractors. In fact, there were direct sub-contracts with local contractors signed without the knowledge of the plaintiffs. Bearing in mind the terms of joint venture agreement, this omission on the part of the defendants was a gross breach of fiduciary duty towards the plaintiffs.

The third defence witness, Mr. Fujishiro stated that he worked as an accounts controller in the construction industry and had been working for the defendants for 19 years. In regard to the project 1.3, he was an accountant. Under cross examination, he stated that he did not believe that the project 1.3 would be profitable. He came to this conclusion when DW1 – Mr. Koda told him so. He was in no position to verify this fact on an independant basis.

He provided monthly accounting data to DW1, and after receiving progress certificate payments from DW1, he prepared the documents for payment. DW3 also confirmed that the accounts for year ending September 1983 were not ready, and that an account book and related documents were kept in Kuala Lumpur, and also the defendants did not keep a separate account on the joint venture. He confirmed that the accounts in Kuala Lumpur were accounts for all projects undertaken by defendants in Malaysia. This seems to confirm the plaintiffs' allegation that the accounts of the project were totally unreliable. He also supported the plaintiffs' evidence that the defendants did not furnish a cash flow statement to plaintiffs, and apart on the occasion on 3 September 1982, no request was made to plaintiffs to make a contribution towards the joint venture.

An important fact that both counsel addressed the court was related to the employment of foreign sub-contractors and the cost factor. Having heard the two experts on this issue namely PW7 – Mr Jaginder Singh and DW4 – Mr. K. Kumarasivam, I wish to state that PW7 gave his evidence in a clear and forthright manner. His qualifications as listed in the report P69 states that he has practised as a civil engineer for 35 years in London, Singapore and Malaysia, apart from being a director of Perunding A & Z Sdn Bhd and Ehmed Consultant Sdn Bhd in Petaling Jaya. PW7 has accumulated a wealth of experience in the field of designs, and supervised the execution of all types of earthworks including his involvement in the 1974-1978 Kuala Lumpur – Karak Highway Project.

After having examined the site of project 1.3. and having studied various documents handed to him by plaintiffs' relating to the project, he was emphatic that around 1982 there were a number of local sub-contractors executing highway projects similar to the project 1.3. Under cross examination, he stated that most of the works in regard to the construction of the Karak Highway was done by local contractors, and gave names of companies such as Mudajaya Construction, Jurutera Percon, Jurutera Lan Siew Wah forerunner of Imeka and Chuah Ah Kee forerunner of Road Builders Bhd. He stated that there was no difference in the construction of a two lane *vis a vis* a four lane Highway.

The evidence of PW7 – Mr. Jaginder Singh is to be tested with that of DW4 – Mr. K. Kumarasivam who is a Consulting Engineer and has done some arbitration work. He stated that in his view, the cost of 1.3 would be in the region of RM92 million at the rate of RM4.3 million per km. He used the cost of the building index produced by the Statistic Department as a guide in evaluating the cost of building roads. He did not think any contractor would make a profit on 1.3 at a tender price of RM69 million. DW4 made no study of either the plaintiffs or defendants budgets or any of the sub-contracts. No evidence was adduced from him to indicate whether he studied the defendants' operational plan and construction programmes. He admitted that in regard to each project, site condition may be different, and made no study of the cost factor of foreign and local sub-contractors. His evidence to my mind, is too general and vague and his studies of other Highway projects were post 1988.

DW4 attempted to try and use the 1989 to 1992 figures backward to compare with the 1982 figure. In doing so, the variation of cost factor from RM5.71 million to RM17.5 million per km shows that a wide margin exists in the rate of calculation, and he admitted so in his evidence. If the figures are used to establish the cost of the project 1.3, it would lead to a ludicrous conclusion in term of cost varying from RM122.265 million to RM161.67 million with respect to Mr K Kumarasivam evidence. His evidence leaves much to be desired. Not only his calculation of the cost factor is flawed for reason given above, his testimony is too vague and not supported by credible facts.

Although he admits that there would not be much difference in cost between local and foreign sub-contractors, yet he admits that foreign sub-contractors would involve a 5% cost increase. Yet he also admits that his figures are raw. He stated categorically therefore that if he had actual tender prices for the years prior to 1988 particularly when 1.3 was being constructed, his figure would be more accurate. Under cross examination he admitted that the method of calculation he used was to give an indicative figure and that his figures are no accurate absolutely, and that the cost of building index is not an accurate method, but only indicative. He also stated that he had not made a study of the project in terms of employment of foreign sub-contractors and the cost factor if a contractor brings in plant from abroad to do a project. This he said would add to cost. He ended his evidence by stating in re-examination that the cost of building index was the only available information he had.

Having reviewed and considered the evidence of both PW7 and DW4, I am of the view that DW4's evidence is not supportable by reasonable and credible facts. His conclusions are based on conjecture to a large degree without any proper foundation. Whereas PW7 gives his evidence in a forthright manner, and I am of the view that PW7 reasons for his conclusion are more reasonable and appropriate, and I have no hesitation in accepting his evidence to that of DW4.

The defendants also raised a series of defence namely limitation, laches and acquiescence on the part of the plaintiffs.

Firstly on the issue of Limitation, the joint venture agreement was maintained throughout the course of project 1.3 and no party contracted out of it. In fact on 23 December 1985, a supplementary agreement was signed between the plaintiffs and defendants whereby defendants agreed to indemnify the plaintiffs against all losses. On that facts and evidence adduced in court, I hold that there have been a series of breaches, both and continuous starting from 1982 till the proceedings were filed on 12 January 1990. To enumerate a few cases of breaches, I wish to state that the requirement under the joint venture agreement to hold regular meetings between the partner was never complied, coupled with the lack of information supplied to the plaintiffs in regard to the various budgets and sub-contracts prepared by the defendants. The accounts of the joint venture also gave rise to a series of breaches of the joint venture agreement. As such the submission by defendants' counsel that limitation applies in this case does not appear to be supported by tangible and credible evidence.

In regard to the defence of laches raised by the defendants, the evidence adduced by the plaintiffs clearly states that, there were a number of reasons why the plaintiffs delayed in issuing the writ of summons. One of the principle reason was because the auditors for the joint venture were unable to give final account, much later, and when the accounts were supplied they were heavily qualified. Furthermore, defendants were unable to supply any relevant documents when final account were taken because they had destroyed their documents. The delay was not the fault of the plaintiffs, but that of the defendants. Any prejudice suffered as a result of the delay was not caused by the action of the plaintiffs. In my view, in regard to Laches certain observations made in the case of *Lindsay Petroleum Company v. Hund* [1874] LR 5 PC p. 221 are pertinent and need to be reproduced:

> Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, thought perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were aferwards to be asserted, in either of these cases, lapse of time and delay are most material. But in in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.
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> In order that the remedy should be lost by laches or delay, it is, if not universally at all events ordinarily and certainly when the delay has been only such as in the present case necessary that there should be sufficient knowledge of the facts constituting the title to relief. It is undoubtedly true that a delay, which might be available by way of defence to persons not under any fiduciary relation or obligation, might not be available by way of defence to those who are affected by a fiduciary relation or obligation.

In the case of *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ where Edgar Joseph Jr. J as he then was stated:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: *14 Halsbury's Laws of England* (3rd Ed.) paras 1181, 1182. Laches has been succinctly described as 'inaction with one's eyes open'.
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> Now, can lapse of time and delay, however gross, in a suit seeking final, as opposed to interlocutory relief, of itself amount to the equitable defence of laches? It is clear that delay in some circumstances can amount to evidence from which the inference can be drawn that the plaintiff has

released (or waived, there seems to be no difference) the claims which he asserts: lapse of time always gives rise to a presumption that a stale suit is ill-founded; for a reasonable man is not likely to sleep on his claims if they are well-founded. Whether it does or does not is a question of fact in each case.

It is possible to point to a number of cases in which plaintiffs have been successful in spite of spectacular delays. In England, in *Burroughes v. Abbot*, rectification of an instrument was granted after a delay of 12 years; in *Weld v. Petrie* the Court of Appeal held that a mortgagor's redemption suit was not barred by a delay of 26 years and in *Pikerring v. Lord Stamford*, it was held that after a delay of 35 years, a portion of a testator's residuary estate which had been devoted by ten trustees of the testator's will to charity was really held by them on trust for the testator's next of kin. In Australia, a decree of specific performance was granted by the High Court in *Fitzgerald v. Masters*, 26 years after the cause of action arose and in *Bester v. Perpetual Trustee & Co Ltd*, Street J rejected a defence of laches where a plaintiff waited 20 years before commencing a suit to rescind a transaction on grounds of undue influence. There are many cases which indicate that mere delay is not a defence in equity. In 1795, in *Pickerig v. Lord Stamford Arden MR* inclined to the view that delay in a situation where no statute of limitation applied, could have legal effect only if it amounted to a realease implied from conduct or was coupled with detriment to the defendant or a third party.

In *Fitzgerald v. Masters*, equitable relief was granted after an inordinate length of time had elapsed. On the point under discussion, Dixon CJ and Fullager J at p. 443 held that there were no circumstances apart from delay for refusing relief, thereby (and in my opinion, correctly) holding that mere delay of itself cannot constitute laches. In *Fullwood v. Fullwood*, Fry J held that mere lapse of time affords no bar in equity.

My research into the authorities on the subject leads me to the conclusion that there are no fixed rules or principles on which the court acts and each case is considered on its merits and particular facts. In the case of Re Farvis Upjohn J said at p. 341:

> I have been referred to a number of textbooks and authorities on this question of laches, acquiescence and delay, but I forbear from referring to them, for in this realm of law each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist.

In this context, the case of *Lindsay Petroleum Co. v. Hurd and Ors* merits reading.

The defence of laches is only allowed where there is no statutory bar: *14 Halsbury's Laws of England* (3rd Ed.) para 1181.

Section 32 of the Limitation Act 1953 (Rev 1981), provides that 'nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.'

As stated by me earlier, the delay if any was caused by the defendants conduct. As such the defence of laches has no substance.

The defence of acquiescence was also raised by the defence. Edgar Joseph Jr. J as he then was, as in the case of Alfred Templeton had this to state:

> The term 'acquiescence', like the term 'laches', is confusingly used in different senses. Three should be referred to: (a) it can refer to the type of estoppel of which *Ramsden v. Dyson* is an example. It is this meaning which Lord Cottenham LC in *Duke of Leeds v. Earl of Amherst* said was the primary meaning of the term. Poole J in *Glasson v. Fuller* thought likewise; (b) it can refer to an element in one of the two kinds of laches, *viz* the action of a plaintiff over a long period of time, with full knowledge of his rights, refraining from exercising his rights in circumstances where it can properly be inferred that he has abondoned them. This is waiver, affirmation, release. This is the sense in which Hansbury uses term when he says: 'The chief element in laches is acquiescence'; (c) finally, as is evident from the question of Lord Wensleydale's speech in *Archbold v. Scully* the term 'acquiescence' can be used as referable only to the second type of laches considered in this chapter, ie, the type of laches which involves prejudice to the defendant or to third parties.
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> Sir Samuel Griffith alluded to these different senses in *Cashman v. 7 North Golden Gate Mining Co* where he said (at pp. 153-154):
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> > The term acquiescence is not a term of art. It was used in courts of equity as a term to characterize a defence which may be set up by a person against whom another makes a claim for equitable relief. It is a well-known doctrine of equity that when a person claiming equitable relief has laid for a long time and so conducted himself that it would be inequitable to permit him to complain of the defendant's actions, the court will refuse to grant the relief. The term also bears another meaning. It may be fairly applied to a man who, seeing an act about to be done to his prejudice, stands by and does not object to it. He may be very properly said to be acquiescing in that act being done. But the difference in point of law in the legal consequences of the two kinds of acquiescence is quite clear. A man who stands by and sees an act about to be done which will be injurious to himself, and makes no objection, cannot complain of that act as wrong at all. He never has any right of action, because he stands by and allows the act to be done. Acquiescence in the other sense is a defence to an action for specific relief, on the ground that the plaintiff cannot be reinstated in his original position without doing injustice to the defendant, but it is not an answer to a cause of action already accrued.

In *Glasson v. Fuller,* Poole J also alluded to the different meanings of the term when he said:

> 'Acquiescence' is used in two senses. If one stands by while he sees the violation of his right in progress, and takes no steps to intervene, he is said to acquiesce in the violation, and he may be thereby debarred from his remedy in respect of it. This is acquiescence in the true sense, but its effect has nothing to do with the lapse of time, and it has no relation to laches. In another sense, acquiescence is used to denote that some equitable right of A has been violated, as where he has been induced to make a gift by undue influence, or where there is a *cestui que* trust, and his trustee has purchased the trust property, and that after the influence has ceased or the violation has been brought to his knowledge he assents to the continuance of the state of affairs resulting from the violation, to the retention of the gift by the donee, or of the property by the trustee. The lapse of time without proceedings being taken by A is evidence of such assent, and upon acquiescence of this latter kind the doctrine of laches is based. Acquiescence in the strict sense implies either that the party acquiescing has abandoned his right, or that he is estopped from asserting it. Acquiescence in this sense is no more than an instance of estoppel by words or conduct. Laches, acquiescence in the second sense, is no defence if there is a Statute of Limitation in operation, unless it exceeds the period allowed by the Statute.

From the facts adduced in the instant case, the plaintiffs had all along protested both orally and in writing to the defendants as to the manner in which the defendants had conducted themselves as partners in regard to the project 1.3. This is supported by the contemporaneous documentary evidence adduced at the trial. I cannot therefore find a basis for the defendants contention that plaintiffs were in any way guilty by their conduct of acquiescence, and I hold as a fact that this was not so.

It was submitted by defendants' counsel that the plaintiffs did not plead fraud in that claim. In my view it was not fatal for the plaintiffs' case in not having pleaded fraud.

After having reviewed all the evidence before me, I have come to the conclusion that there has been a valid and subsisting joint venture agreement between the plaintiffs and defendants at all times, and this agreement was never terminated by either party.

It is trite law to state that in execution of such an agreement, the parties have certain legal obligations to each other, and also have a fiduciary relationship. An essential feature of the joint venture agreement is stated in cl. 12 which reads as follows:

> The parties hereto shall use their best endeavour to ensure that the joint venture shall work successfully and profitably and to further the goodwill of the joint venture, and in furtherance hereof, the parties shall keep each other promptly informed in respect of all matters relating to or affecting the joint venture.

From the evidence adduced both orally and documentary at the trial, I am satisfied that the plaintiffs have proved on a balance of probabilities, that defendants have committed a series of breaches relating to cl. 12 and other clauses of the joint venture agreement. I have already given details of the various breaches earlier as stated above.

In my view there has been a breach of contract for a number of reasons as mentioned earlier, bearing in mind that the parties were under a contractual obligation to use their best endeavour to ensure that the joint venture agreement was successfully and profitably carried out. The defendants admitted that at the very outset they intended to make a loss so as to establish a foothold in the construction industry in Malaysia. This admission on the part of the defendants show that they had no intention to comply with cl. 12 of the joint venture agreement. This fundamental breach coupled with other breaches stated earlier amounts to my mind, a breach of the terms of the contract, and the breaches in the contract continued unabated.

A number of reliefs were applied for by the plaintiffs for the breach committed by the defendants. There were common law damages for breaches of joint venture agreement and supplements, damages and compensation in equity for breach of fiduciary duty, accounts to be taken, and all neccessary enquiries of them. I propose to consider the claim for damages for breach of contract and the equitable remedies such as accounts and equitable compensation.

The difficulty with the remedy of account is that the accounts relating to primary evidence had been mostly destroyed. The accounts and other documents ie, estimates by Mr. Sano and Mr. Koda, working papers, supporting material for defendants various budgets, minutes of site meetings, sub-contract agreement with local sub-contractors, and other relevant records are not available. In fact there was no excuse for the defendants to destroy the documents, bearing in mind that plaintiffs have intimated earlier that they were not satisfied with the manner in which the defendants had conducted themselves as partners, as shown by defendants' inability to answer a large number of enquiries from PW4 – Mr. Richard Ong. Since the relevant documents are not forthcoming, an order made to render accounts would be futile. Therefore, I have decided that the prayer for accounts would not be a suitable remedy.

In view of this, I propose to consider plaintiffs counsel's submission that the damages flowing from such a breach will be parallel to the claim for equitable compensation. This concept was propounded in the case of *Nocton v. Lord Ashburton* [1914] AC 932 at 956 Viscount Haldane LC stated:

> Court of Equity has jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him ...

This remedy as an alternative to an account has been established as stated by the author of *Finn's Equity and Commercial Relations,* Chapter 7 which recognises this in the following passage at p. 206:

> The remedy of equitable compensation for breach of fiduciary duty is well recognised. It is to this head that awards of damages such as in *Seager v. Copydex* are properly to be assigned.

In the case of *Fraser Edmiston Pty Ltd v. AGT (QLD) Pty Ltd* 2 Qd R the learned judge came to the conclusion in the absence of proper books of accounts and primary records, that it would be more proper to assess equitable compensation based on evidence and reasonable inferences. In the instant case William J stated at p. 11 as follows:

> Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. Any such benefit or gain is held by the fiduciary as constructive trustee ... that constructive trust arises from the fact that a personal benefit or gain has been so obtained or received and it is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary obligation was owed. In some perhaps most cases the constructive trust will be consequent upon an actual breach of fiduciary duty; for example an active pursuit of personal interest in disregard of fiduciary duty or misuse of fiduciary power for personal gain ... The principle governing the liability to account for a benefit or gain as a constructive trustee is applicable to fiduciaries generally including partners and former partners in relation to their dealings with partnership property and the benefits and opportunities associated therewith or arising therefrom.

In assessing equitable compensation, the court is allowed a much more flexible approach, and is not 'straight jacketed' to the same extent as it would be in assessing common law damages. The flexibility of the approach can be seen *inter alia* from the following passages in well known authorities.

"In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, ie, the plaintiff's loss of opportunity. The plaintiff's loss as a result of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach" (emphasis added) and as stated in the case of *Target Holdings Ltd v. Redferns* [1996] 1 AC 421 at 438A per Lord Browne-Wilkinson:

> The obligation imposed by courts of equity upon defaulting trustees and the fiduciaries is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract. It follows that the obligation is not limited or influenced by common law principles governing remoteness of damage, foreseeability or causation.

In regard to the prayer for account to be taken to ascertain profit on other highway projects subsequent to the project 1.3, I do not think I am prepared to consider this prayer.

In order to arrive at any satisfactory figure in regard to equitable compensation, the court has to examine all the evidence adduced at the trial whereby the court can come to a satisfactory and fair figure. The figures quoted at the trial in regard to the cost of 1.3. are:

(a) Mr. Koda's estimate as per 1st Internal Budget at RM68.27 million.

(b) Final cost of project at approximately RM100 million.

(c) Mr. P.H. Chan's estimate at RM63 million.

(d) Defendants' tender at RM69,180,000 and RM71,543,460.

(e) Mr. K. Kumarasivam's estimate at RM92 million.

I have already given in detail my reasons why I consider Mr. K. Kumarasivam's method of calculation, in regard to the cost of 1.3 is flawed, and the variation of the cost of the project from RM5.71 million to RM15.15 million per km, shows that Mr. Kumarasivam's evidence lacks credibility.

In regard to the 1st Internal Budget, DW1 stated that it was a break even budget at RM68.27 million. If this figure is to be accepted, then it would be totally out of character for defendants to tender for the project, knowing very well it would end up in an enormous loss. In fact the estimate of DW1 in the 1st Internal Budget comes close to that of the estimate in MR PH Chan's budget of RM63 million. The budget prepared by Mr PH Chan was done by a team of qualified an experienced personnel including engineer, quantity surveyor, technical assistant, and sub-contractors.

One must bear in mind that plaintiffs have already had a track record for construction of roads, and in fact had assisted defendants in preparing that unsuccessful tender for the earlier project of 1.1, and 1.2. Plaintiffs also have access to defendants detailed construction programmes. So convinced were plaintiffs of the RM63 million budget that they were willing to take over the project 1.3 for RM67.725 million, thus assuring the joint venture of a profit.

If one examines plaintiffs' RM63 million budget (P13), one can see that it is a detailed document including quotations for sub-contractors. DW1 – Mr. Koda made some cursory comments on plaintiffs' budget, but Mr. P.H. Chan was not cross-examined on the material parts of his evidence, in regard to certain items referred to by him, in his budget. The preparation of P13 was done over a period of time between December 1981 and December 1982, and Mr Low Nga also assisted in the preparation. Lastly even DW1 – Mr Koda in his evidence gave no reasonable explanation as to why PH Chan's estimate of the budget of RM63 million was in error.

As stated by me in my grounds earlier, the joint venture accounts do not reflect the joint venture's actual expenditure. The final draft audited accounts were unsigned and were heavily qualified by the auditors Messrs. Lim, Ali and Co. and are of little probative value.

I have already stated earlier that PW4 – Richard Ong had prepared a comprehensive report of the investigation, and he stated that in his view, a sum of RM23,576,000 was overcharged to the joint venture. He also held that a sum of RM4.7 million was in his view doubtfully charged to the joint venture, as well as there was foreign exchange gain and other income of RM3,908,052 and a sum of RM4,522,644 being the estimated profit skimmed off by Japanese sub contractors under the defendants' umbrella concept. As such there was an amount of RM36,706,696 that should be deducted from the alleged cost of RM100,330,544 of the project. As such the cost of the project 1.3 amounted to RM63,623,848. The income for the project amounted to RM76,335,332. As such the profit should have been RM12,711,484. Therefore, the plaintiffs' 30% share of his profit

would amount to RM3,813,445. As to the plaintiffs' claim for an amount of profit from the construction of highway project subsequent to the present contract, I hold that no credible evidence was adduced to support this aspect of plaintiffs' claim.

The counterclaim filed by the defendants is devoid of any merits, bearing in mind the contents of the supplementary agreement entered into by the parties where the defendants agreed to indemnify the plaintiffs against all loses in the event of a loss.

As such the plaintiffs are entitled to a sum of RM3,813,445 as damages at 6% interest from date of filing of the writ till date of judgment, thereafter at 8% till date of satisfaction. Costs to the plaintiffs with certificates of two counsels.